APPEAL NO. 022184
FILED OCTOBER 8, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was begun on June 5, 2002, but continued at the request of the appellant (self-insured) and completed on August 6, 2002. The hearing officer determined that the respondent (claimant) reached maximum medical improvement (MMI) on September 4, 2001, as determined by the Texas Workers' Compensation Commission (Commission)-selected designated doctor, and that the claimant had disability from April 27 through September 4, 2001. The self-insured appeals and our file does not contain a response from the claimant.

DECISION

Affirmed as to the date of MMI; reversed and remanded as to the period of disability.

The self-insured contends that the first designated doctor's report should have been afforded presumptive weight, that the Commission abused its discretion in appointing a second designated doctor, and that the hearing officer abused his discretion by not keeping the record open so that the carrier could submit the second designated doctor's answers to a deposition by written questions.

The hearing officer correctly declined to adopt the report of the first designated doctor. As the hearing officer noted in his Statement of the Evidence, the first designated doctor was asked to provide clarification of the MMI date by a Commission Dispute Resolution Officer on November 2, 2000. When he finally responded to the clarification request on March 5, 2001, he stated "[based] on the information give [sic] by [Dr. AJ], the MMI maybe [sic] extended for another eight weeks from my MMI date of 4/27/2000." This could not serve as a valid certification of a new, later MMI date (s*ee* Texas Workers' Compensation Commission Appeal No. 010297-s, decided March 29, 2001) and certainly raised questions about the validity of the April 27, 2000, certification. The hearing officer did not err by not affording presumptive weight to the MMI date in the first designated doctor's report.

There was no issue before the hearing officer with respect to whether the Commission abused its discretion in appointing a second designated doctor, nor is it clear from the record why there was an appointment of another designated doctor. However, we will not condone the self-insured's action in awaiting the second designated doctor's report and then raising the complaint that the appointment of the second designated doctor was an abuse of discretion. We have previously addressed a similar concern in the context of different factual settings, but reached generally the same result. In Texas Worker's Compensation Commission Appeal No. 94740, decided July 12, 1994, claimant contended on appeal that the designated doctor should not

have been selected as a designated doctor because she had, on four previous occasions, examined the claimant and prescribed medication. Neither party had objected to the appointment of the designated doctor. We said:

> Both in [Texas Workers' Compensation Commission] Appeal No. 93706, [decided September 27, 1993], and Texas Workers' Compensation Commission Appeal No. 93501, decided August 2, 1993, the Appeals Panel suggested the appropriate time to protest the appointment of the designated doctor based on prior involvement is prior to the examination so another doctor could be appointed. Appeal No. 93501 suggests 'that there is an element of estoppel when both parties allow a dispute to proceed to appointment of a designated doctor . . .' before raising a complaint. It is suggested that it is not good practice to allow a case to go to a designated doctor to obtain that rating before deciding whether to raise an available defense, depending on what the designated doctor said.

In a long line of cases involving the now repealed Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)), we stated that, "there is an element of estoppel when a party allows the designated doctor process to run its course, only to claim finality of the first impairment rating after the designated doctor's results are known." Texas Worker's Compensation Commission Appeal No. 94797, decided August 5, 1994. *Accord*, the result in Texas Worker's Compensation Commission Appeal No. 962246, decided December 18, 1996, where we declined to apply estoppel because the claimant in that case called the Commission to complain when he learned that the designated doctor shared office space with a required medical examination doctor, and he did so before he knew what the rating was from the designated doctor. Likewise, in Texas Worker's Compensation Commission Appeal No. 970946, decided June 26, 1997, the claimant called the Commission at the time she was scheduled for an appointment with a second designated doctor, inquiring as to why a second designated doctor had been appointed. She was told to keep the appointment as scheduled, and believed that she was required to submit to the examination. We were not persuaded that the claimant in that case waited too long to assert error in the appointment of a second designated doctor. We are satisfied in the instant case that the self-insured did not raise a complaint about the appointment of the second designated doctor. Consequently, we hold that the self-insured is estopped from objecting to the appointment of a second designated doctor by not objecting timely.

With respect to the self-insured's contention that the hearing officer abused his discretion by refusing to keep the record open, we note that a benefit review conference was held on April 5, 2002, and at the first session of the CCH on June 5, 2002, the hearing was continued at the request of the self-insured. The CCH reconvened on August 6, 2002, at which time the self-insured requested that the record be held open to allow it to present the designated doctor's answers to deposition by written questions. The hearing officer denied that request. The self-insured had more than two months between the first CCH and the second CCH to request and procure the designated doctor's answers to the deposition on written questions. This would have been ample

time, had the self-insured exercised due diligence. The hearing officer did not abuse his discretion by declining to keep the record open.

The self-insured also contends that the designated doctor's report is against the great weight of the evidence. The report of the designated doctor (including a clarification under Rule 130.6(i)) has presumptive weight, and the Commission shall base its determination as to the MMI on that report "unless the great weight of the other medical evidence is to the contrary." Section 408.122(c). We have held that a "great weight" determination requires more than a mere balancing or preponderance of the evidence; that no other doctor's report, including the treating doctor's report, is accorded the special presumptive status of the designated doctor's report; and that the designated doctor's report should not be rejected absent a substantial basis for doing so. Texas Workers' Compensation Commission Appeal No. 960897, decided June 28, 1996. Whether the party challenging a designated doctor's report has produced the great weight of other medical evidence contrary to the report and whether the presumption afforded to the report is rebutted are questions of fact for the hearing officer. Texas Workers' Compensation Commission Appeal No. 950561, decided May 22, 1995. The hearing officer determined that the date of MMI assigned by the second designated doctor, pursuant to the request for clarification, is not against the great weight of medical evidence. As an appellate-reviewing tribunal, the Appeals Panel will not upset the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). We do not find them so here, and we affirm the decision and order of the hearing officer as it pertains to the date of MMI.

The self-insured's appeal of disability was premised upon its appeal of the determination that the claimant reached MMI on April 27, 2000. Since we have affirmed the hearing officer's determination that the claimant did not reach MMI until September 4, 2001, we are inclined to affirm the hearing officer's determination of continuing disability. However, we note that the hearing officer has used several different dates and has left confusion as to the period of disability he actually found. The disability issue at the CCH was: "Did the Claimant have disability from April 27, 2000 through September 4, 2001?" The hearing officer concluded and entered a decision that: "The Claimant did have disability from April 27, 2001 and continuing through to September 4, 2001." The confusion arises because, under the circumstances of this case, we would expect the disability period to be related to the MMI date, and not start up exactly one year after the old MMI date and run until the new MMI date. We did not see any evidence in the record supporting disability beginning on April 27, 2001, and suspect that the hearing officer has made an error in assigning that as the start date of disability, rather than April 27, 2000. We must remand for the hearing officer to consider and clarify the dates of disability in this case.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision

must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **(a self-insured governmental entity)** and the name and address of its registered agent for service of process is

SUPERINTENDENT
(ADDRESS)
(CITY), TEXAS (ZIP CODE).

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Michael B. McShane
Appeals Judge

CONCUR:

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Elaine M. Chaney
Appeals Judge

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Gary L. Kilgore
Appeals Judge